

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

BIG CITY DYNASTY, et al.,
Plaintiff(s),

Case No.: 2:19-cv-02078-APG-NJK

V.

Order

FP HOLDINGS, L.P.,
Defendant(s).

[Docket No. 38]

Pending before the Court is the motion by Defendant FP Holdings (“the Palms”) to compel discovery and for an award of expenses. Docket No. 38.¹ Plaintiffs Big City Dynasty and Ryan Kaskade (collectively, “Kaskade”) filed a response in opposition. Docket No. 40.² The Palms filed a reply. Docket No. 41. The motion is properly resolved without a hearing. *See* Local Rule 78-1.

I. BACKGROUND

Kaskade is an acclaimed musician and DJ specializing in electronic dance music. Compl. at ¶ 18; *see also id.* at ¶ 20. The Palms is a Las Vegas hotel and casino offering a variety of entertainment options, including the KAOS nightclub and dayclub. *See id.* at ¶¶ 19-20.

Sensing the potential for a successful partnership, Kaskade and the Palms entered into an agreement for Kaskade to have a residency at KAOS through which he would engage in 30 performances in 2019 and another 30 performances in 2020. *See id.* at ¶¶ 20, 22. The first 20

¹ Although this order refers to the Palms as a shorthand for Defendant, FP Holdings is actually the company that owns the Palms.

² Although this order refers to Kaskade as a shorthand for Plaintiffs, Mr. Raddon is the performer known as Kaskade and Big City Dynasty is the company through which he conducts business.

1 performances in 2019 proceeded as anticipated. *See id.* at ¶ 30. Then the music stopped.³ In
 2 particular, Kaskade alleges that his three residency performances for October 2019 were canceled
 3 due to construction at KAOS. *See id.* at ¶ 31. KAOS still paid Kaskade for those canceled shows
 4 and also provided a partial payment due at that time for the anticipated 2020 performances. *See*
 5 *id.* at ¶ 34.

6 The complaint alleges that the Palms then canceled Kaskade's show set for November 8,
 7 2019, and announced that it was closing KAOS indefinitely. *Id.* at ¶ 36. Kaskade alleges that the
 8 Palms did not then fulfill its contractual obligation to find a suitable replacement venue. *See id.* at
 9 ¶ 37. On November 13, 2019, Kaskade served written notice that he was contending that the Palms
 10 was in breach of their agreement. *Id.* at ¶ 41. Kaskade alleges that the Palms did not thereafter
 11 cure the breach. *Id.* at ¶ 42. On December 3, 2019, Kaskade terminated the agreement given the
 12 assertions of a material breach by the Palms. *Id.* at ¶ 43.

13 On December 4, 2019, Kaskade brought a breach of contract action in this Court on the
 14 basis of diversity jurisdiction. Kaskade seeks damages for the unpaid balance for the performances
 15 remaining in 2019, as well as for the remaining balance of fees for the anticipated performances
 16 in 2020. *See id.* at ¶ 45.⁴ The Palms responded with, *inter alia*, an affirmative defense that Kaskade
 17 has failed to mitigate damages. Docket No. 16 at 11.

18 The parties are now before the Court on a dispute regarding the Palms' efforts to obtain
 19 discovery regarding Kaskade's mitigation efforts.

20 II. STANDARDS

21 “[B]road discretion is vested in the trial court to permit or deny discovery.” *Hallett v.*
 22 *Morgan*, 296 F.3d 732, 751 (9th Cir. 2002); *see also Crawford-El v. Britton*, 523 U.S. 574, 598

23 ³ In the words of a similarly-named electropop group, one might say that there was an
 24 evacuation of the dancefloor. *See Cascada*, “Evacuate the Dancefloor” (AATW, Zeitgeist,
 Robbins 2009).

25 ⁴ The Court previously allowed redactions to the complaint with respect to the
 26 compensation information based on Kaskade's showing that he would be competitively
 27 disadvantaged in future negotiations were that information made public. Docket No. 28. The
 28 pending motion practice provides such information on the public docket and indicates that Kaskade
 no longer seeks to shield such information. *See Mot.* at 2 & n.1. A separate order will issue with
 respect to the redactions in the complaint in light of the changed position.

1 (1998). When a party fails to provide discovery, the requesting party may move to compel it. Fed.
 2 R. Civ. P. 37(a). The party seeking to avoid discovery bears the burden of showing why the
 3 discovery should not be permitted. *V5 Techs. v. Switch, Ltd.*, 334 F.R.D. 306, 309 (D. Nev. 2019)
 4 (citing *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975)).⁵ The party resisting
 5 discovery must specifically detail the reasons why each request is irrelevant or otherwise
 6 objectionable, and may not rely on boilerplate, generalized, conclusory, or speculative arguments.
 7 *F.T.C. v. AMG Servs., Inc.*, 291 F.R.D. 544, 553 (D. Nev. 2013). Arguments against discovery
 8 must be supported by “specific examples and articulated reasoning.” *E.E.O.C. v. Caesars Ent.*,
 9 237 F.R.D. 428, 432 (D. Nev. 2006).

10 Discovery is limited to relevant matter. Fed. R. Civ. P. 26(b)(1). District courts enjoy
 11 wide discretion in deciding relevance for discovery purposes. *Shaw v. Experian Info. Solutions,*
 12 *Inc.*, 306 F.R.D. 293, 296 (S.D. Cal. 2015). To be permissible, discovery must be “relevant to any
 13 party’s claim or defense.” *In re Bard IVC Filters Prods. Liab. Litig.*, 317 F.R.D. 562, 563 (D.
 14 Ariz. 2016).⁶ “Information within this scope of discovery need not be admissible in evidence to
 15 be discoverable.” Fed. R. Civ. P. 26(b)(1). Relevance for discovery purposes remains broad in
 16 scope. *V5 Technologies*, 334 F.R.D. at 309 (citing *Fed. Nat’l Mortg. Ass’n v. SFR Invs. Pool 1,*
 17 *LLC*, No. 2:14-cv-02046-JAD-PAL, 2016 WL 778368, at *2 n.16 (D. Nev. Feb. 25, 2016)).

18 III. ANALYSIS

19 The instant discovery dispute is relatively straightforward. The Palms pled a defense that
 20 Kaskade’s failure to mitigate offsets or eliminates any damages that may be awarded. Docket No.
 21 16 at 11. The Palms propounded discovery in an effort to support that defense and argues that
 22

23 ⁵ The parties articulate the applicable burden of persuasion differently. See Mot. at 7; Resp.
 24 at 3. The Court has its own duty to correctly articulate legal standards. *Bateman v. United States*
Postal Serv., 231 F.3d. 1220, 1224 (9th Cir. 2000). For the reasons explained elsewhere, this Court
 25 has concluded that the burden is on the party opposing discovery to establish irrelevance. *V5*
Technologies, 334 F.R.D. at 309-10. Ultimately, the assignment of burdens is not of particular
 26 importance for the pending motion, however, as the outcome is the same regardless.

27 ⁶ The discovery rules were amended in 2015, since which time it has been clear that the
 standard for relevance is not whether the information sought is reasonably calculated to lead to the
 28 discovery of admissible evidence. See *Bard IVC Filters*, 317 F.R.D. at 563-64. Cases articulating
 that standard have been abrogated. *Id.* at 564.

1 such discovery must be provided given that it seeks information pertinent to a live defense. *E.g.*,
 2 Mot. at 7-8. Kaskade has refused to provide responsive documents, however, on the grounds that
 3 the information is not relevant. In support of that objection, Kaskade argues that the information
 4 is irrelevant because “mitigation simply is not an appropriate affirmative defense” based on the
 5 contract at issue in this case and that he plans to raise this argument in “dispositive motion briefing
 6 to follow.” *See* Resp. at 2, 3-5, 9. Kaskade also challenges the potential use of information on
 7 performances outside of Las Vegas on the grounds that they are not comparable for mitigation
 8 purposes, which he contends also renders discovery of such information irrelevant. *See id.* at 6-8.
 9 The relevance objection lacks merit.⁷

10 The only issue currently before the Court is whether the discovery sought is relevant to any
 11 claim or defense. It is. The Palms’ mitigation defense indisputably remains a live defense at this
 12 time. Nonetheless, Kaskade has refused to provide discovery based on merits-based arguments as
 13 to whether mitigation efforts are permissibly considered with respect to damages in this case and,
 14 if so, what performances should be considered as part of that inquiry. Kaskade was not permitted
 15 to withhold discovery on those bases. “[A] party is entitled to seek discovery on its theory of the
 16 facts and the law, and is not limited in discovery by the opponent’s theory.” 8 Wright, Miller, &
 17 Marcus, FEDERAL PRACTICE AND PROCEDURE, § 2011 at p. 274 (2010); *accord in re Cooper Tire*
 18 & Rubber Co., 568 F.3d 1180, 1192 (10th Cir. 2009). To that end, this Court has repeatedly
 19 rejected attempts to define the bounds of appropriate discovery by challenging the merits of
 20 existing claims or defenses in briefing discovery motions. *See Colony Ins. Co. v. Sanchez*, No.
 21 2:18-cv-01950-JCM-NJK, 2019 WL 3241160, at *2 (D. Nev. July 18, 2019); *Cardinali v.*
 22 *Plusfour, Inc.*, No. 2:16-cv-02046-JAD-NJK, 2018 WL 7502644, at *6 n.7 (D. Nev. Oct. 9, 2018);
 23 *Kiessling v. Rader*, No. 2:16-cv-00690-GMN-NJK, 2017 WL 11310113, at *3 (D. Nev. Feb. 17,
 24

25 ⁷ Kaskade also makes a conclusory argument that the disputed discovery is “overbroad and
 26 unduly burdensome.” Resp. at 8. Courts summarily reject boilerplate objections and ill-developed
 27 arguments. *See A. Farber & Partners, Inc. v. Garber*, 234 F.R.D. 186, 188 (C.D. Cal. 2006); *see also V5 Techs. v. Switch, Ltd.*, 334 F.R.D. 297, 301 & n.1 (D. Nev. 2019). Kaskade having not
 28 provided the requisite factual basis or meaningful argument necessary to prevail on such
 objections, the Court rejects his assertion of overbreadth and undue burden to the extent they differ
 from the issues discussed herein with respect to the relevance objection.

1 2017), *objections overruled*, 2018 WL 1401972, at *3 (D. Nev. Mar. 20, 2018); *McSwiggin v.*
 2 *Omni Limousine*, No. 14-cv-02172-JCM-NJK, 2016 WL 1030053, at *5 (D. Nev. Mar. 10, 2016);
 3 *Walker v. N. Las Vegas Police Dept.*, No. 14-cv-01475-JAD-NJK, 2015 WL 8328263, at *2 (D.
 4 Nev. Dec. 8, 2015). Other courts have issued similar rulings. *See, e.g., Natural Res. Def. Council*
 5 *v. Curtis*, 189 F.R.D. 4, 8 (D.D.C. 1999); *S.E.C. v. Laura*, No. 18-Civ-5075 (NGG)(VMS), 2020
 6 WL 5152873, at *6 (E.D.N.Y. Aug. 31, 2020); *McGraw-Hill Global Educ., LLC v. Jones*, No.
 7 5:14-cv-42-TBR-LLK, 2015 WL 5074487, at *4 (W.D. Ky. Aug. 8, 2015); *Nat'l Union Fire Ins.*
 8 *Co. of Pittsburgh, PA v. Coinstar, Inc.*, No. C13-1014-JCC, 2014 WL 3396124, at *2 (W.D. Wash.
 9 July 10, 2014); *Charter Oak Fire Ins. Co. v. Am. Capital, Ltd.*, Civil Action No. DKC 09-0100,
 10 2011 WL 6000562, at *2 (D. Md. Nov. 29, 2011); *Wells Fargo Bank, N.A. v. Konover*, No. 3:05-
 11 cv-1924 (CFD)(WIG), 2010 WL 11561491, at *9 (D. Conn. June 22, 2010); *Tacori Enterps. v.*
 12 *Rego Mfg.*, No. 1:05-cv-2241, 2007 WL 2238345, at *2 (N.D. Ohio Aug. 1, 2007); *Equilon*
 13 *Enterps. LLC v. Shahbazi*, No. C 05-05102 JF (RS), 2007 WL 2141357, at *1 (N.D. Cal. July 25,
 14 2007); *WHS Sales Corp. v. Cinmar, L.P.*, No. 06-Civ-1938 (SHS)(HBP), 2007 WL 486603, at *1
 15 (S.D.N.Y. Feb. 13, 2007); *Robbins v. NCO Fin. Sys., Inc.*, No. 2:06-cv-116, 2006 WL 3833352, at
 16 *5 (N.D. Ind. Dec. 12, 2006). Kaskade cites to no countervailing authority in urging the Court to
 17 deem discovery irrelevant based on merits-based challenges that he intends to raise in a dispositive
 18 motion to be filed at some later time.⁸ There is good reason to eschew resolution of merits-based
 19 challenges presented in the guise of a relevance objection.

20 The starting point of the analysis is the text of the governing rule, as courts generally
 21 interpret the discovery provisions in the Federal Rules of Civil Procedure based on their plain
 22 meaning. *See Paige v. Consumer Programs, Inc.*, 248 F.R.D. 272, 275 (C.D. Cal. 2008) (citing
 23 *Business Guides, Inc. v. Chromatic Comms. Enterps., Inc.*, 498 U.S. 533, 540 (1991)). The text
 24 of Rule 26(b)(1) confines discovery to “matter that is relevant to any party’s claim or defense.”
 25 As it relates to a live defense in this case, discovery into Kaskade’s mitigation clearly fits within
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27 ⁸ Kaskade’s cited authorities instead involve merits-based decisions rendered in the
 28 summary judgment context. None of the decisions emanates from a court that issues binding
 rulings for this case.

1 that language. A basic flaw with Kaskade’s approach is that he would instead have the Court
 2 interpret the standard as being “matter that is relevant to any party’s legally meritorious claim or
 3 defense,” which is simply not how the rule is written. No justification has been provided to
 4 construe the plain language of the rule to mean something other than what it says. The Court
 5 rejects Kaskade’s attempt to shoehorn his merits-based arguments into a relevance objection.

6 Although a reading of the plain language of the rule suffices to resolve the motion here,
 7 the Court also notes that there are ample policy reasons supporting this approach. Courts strive to
 8 ensure that cases proceed to resolution in a manner that is just, speedy, and inexpensive. Fed. R.
 9 Civ. P. 1. Federal litigation is generally structured in stages by which the pleadings are settled,
 10 discovery is completed, and then the merits are addressed through dispositive motions and trial.

11 *See Natural Resources Defense Council*, 189 F.R.D. at 8. Kaskade’s proposed approach turns that
 12 system on its head, as it would allow the discovery cutoff to lapse without discovery on a live
 13 defense based on the anticipated filing of a later dispositive motion. Were that approach endorsed
 14 and the anticipated dispositive motion ultimately proves unsuccessful, then the case would revert
 15 back to the discovery phase to conduct the discovery that had been curtailed. Such a scenario
 16 would lead to unnecessary delay and inconvenience in contravention of Rule 1. *See WHS Sales*,
 17 2007 WL 486603, at *1.⁹

18 Kaskade’s approach also fails to appreciate the distinct roles within the district court of
 19 magistrate judges and district judges. As a general matter, magistrate judges resolve discovery
 20 disputes and other non-dispositive pretrial matters, while district judges resolve dispositive
 21 motions and preside over trial. *See Fed. R. Civ. P. 72*. Given that division of responsibility,

22 ⁹ This does not mean that an unscrupulous litigant can bring legally baseless claims or
 23 defenses as a means to harass an opponent through pointless discovery. When a litigant has filed
 24 a motion that is potentially dispositive of the case or of a particular matter in the case, it may seek
 25 a stay of the corresponding discovery. *See Tradebay, LLC v. eBay, Inc.*, 278 F.R.D. 597, 602 (D.
 26 Nev. 2011). A motion to stay discovery succeeds only upon a strong showing that, *inter alia*,
 27 “convinces” a magistrate judge that there is “no question” that the dispositive motion will be
 28 granted. *Kor Media Grp., LLC v. Green*, 294 F.R.D. 579, 583 (D. Nev. 2013). “That standard is
 not easily met.” *Id.* Although Kaskade is effectively seeking a stay of discovery on the mitigation
 defense, such relief is unavailable to him because he has not filed a dispositive motion challenging
 that defense and he has not attempted to satisfy the robust standards for obtaining such relief.
 Litigants may not bypass the procedures and standards for obtaining what is effectively a stay of
 discovery on a particular defense by instead framing the same arguments as a relevance objection.

1 magistrate judges are not generally empowered to resolve the type of merits-based arguments that
 2 Kaskade is advancing. *Natural Resources Defense Council*, 189 F.R.D. at 9 (asking a magistrate
 3 judge to entertain a merits-based argument in briefing a discovery dispute “puts the cart before the
 4 horse and this horse can’t pull it”); *see also Thompson v. Sosa*, No. 03-cv-1726-IEG (BLM), 2006
 5 WL 8446283, at *3 (S.D. Cal. Feb. 13, 2006) (citing *Pub. Serv. Enter. Grp. Inc. v. Philadelphia*
 6 *Elec. Co.*, 130 F.R.D. 543, 552 (D.N.J. 1990) and *United States v. 216 Bottles of Sudden Change*,
 7 36 F.R.D. 695, 700 (E.D.N.Y. 1965)). Moreover, magistrate judges are rightly reluctant to attempt
 8 to predict how a district judge might view merits-based arguments, both because a different judge
 9 may view the arguments differently and because issuance of a decision addressing the merits could
 10 prejudice the outcome on those issues. *See Robbins*, 2006 WL 3833352, at *5; *see also Tradebay*,
 11 278 F.R.D. at 603. Such reluctance is heightened when no dispositive motion has even been filed
 12 in which the merits-based arguments have been fully vetted through the briefing process with
 13 application of the governing standards, leaving the magistrate judge instead with an abbreviated
 14 presentation of the arguments in the context of a discovery motion. With all of these considerations
 15 in mind, a discovery motion before a magistrate judge is not an appropriate vehicle for seeking
 16 adjudication of merits-based arguments. Such arguments should instead be presented through
 17 dispositive motion practice.

18 For these reasons, the Court rejects Kaskade’s relevance arguments premised on his
 19 anticipated legal challenges to the Palms’ mitigation defense. That Kaskade believes he will
 20 prevail in defeating or limiting that defense through merits-based arguments presented in future
 21 dispositive motion practice does not render irrelevant the Palms’ discovery probing the facts of
 22 that currently-live defense. Accordingly, the Palms’ motion to compel will be granted. Kaskade
 23 must respond to the discovery requests by October 9, 2020.

24 **IV. AWARD OF EXPENSES**

25 The Palms also seeks an award of expenses incurred in bringing the instant motion to
 26 compel pursuant to Rule 37(a)(5)(A) of the Federal Rules of Civil Procedure. *See Mot.* at 9.
 27 Kaskade counters that an award of expenses is unwarranted given the circumstances of this dispute.
 28 *See Resp.* at 8-9. The Palms has the better argument.

1 A pillar of federal litigation is that discovery should proceed with minimal involvement of
 2 the Court. *Cardoza v. Bloomin' Brands, Inc.*, 141 F. Supp. 3d 1137, 1145 (D. Nev. 2015) (quoting
 3 *F.D.I.C. v. Butcher*, 116 F.R.D. 196, 203 (E.D. Tenn. 1986)). Instead of forcing judicial oversight
 4 of every dispute, attorneys are expected to approach discovery with an eye toward cooperation,
 5 practicality, and sensibility. *In re Convergent Techs. Securities Litig.*, 108 F.R.D. 328, 331 (N.D.
 6 Cal. 1985). The governing rules reflect this in several ways, including providing a presumption
 7 that reasonable expenses—including attorneys’ fees—will be awarded to the party that prevails on
 8 a discovery motion. *Rickels v. City of S. Bend, Ind.*, 33 F.3d 785, 786-87 (7th Cir. 1994).¹⁰ By
 9 design, these “rules should deter the abuse implicit in carrying or forcing a discovery dispute to
 10 the court when no genuine dispute exists.” Fed. R. Civ. P. 37(a)(4) advisory committee’s note to
 11 1970 amendment; *see also Marquis v. Chrysler Corp.*, 577 F.2d 624, 642 (9th Cir. 1978).

12 The losing party may rebut the presumption of an award of expenses by establishing that
 13 its position was “substantially justified.” Fed. R. Civ. P. 37(a)(5)(A)(ii).¹¹ A position is
 14 substantially justified when “the parties had a genuine dispute on matters on which reasonable
 15 people could differ as to the appropriate outcome.” *Roberts v. Clark Cty. Sch. Dist.*, 312 F.R.D.
 16 594, 609 (D. Nev. 2016) (citing *Pierce v. Underwood*, 487 U.S. 552, 565 (1988)). The party facing
 17 an award of expenses bears the burden of establishing substantial justification. *See Flamingo
 18 Trails*, 316 F.R.D. 327, 335 (D. Nev. 2016).

19 District courts have “great latitude” in awarding expenses under Rule 37. *Lew v. Kona
 20 Hosp.*, 754 F.2d 1420, 1425 (9th Cir. 1985).

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22 ¹⁰ Such expenses are awarded after an “opportunity to be heard.” Fed. R. Civ. P. 37(a)(5)(A). An “opportunity to be heard” does not require either a formal hearing or a separate motion for an award of expenses. *See, e.g., Pac. Harbor Capital, Inc. v. Carnival Air Lines, Inc.*, 210 F.3d 1112, 1118 (9th Cir. 2000). When a motion to compel itself seeks an award of expenses, a sufficient opportunity is afforded in that the responding party may present argument in its response to the motion to compel. *See Kiessling v. Rader*, No. 2:16-cv-0690-GMN-NJK, 2018 WL 1401972, at *5 (D. Nev. Mar. 20, 2018).

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26 ¹¹ An award of expenses is also unwarranted when the prevailing party did not conduct a meet-and-confer before seeking judicial intervention or when an award of expenses would be unjust. Fed. R. Civ. P. 37(a)(5)(A)(i), (iii). Kaskade does not oppose the request for an award of expenses on either of these bases. *See* Resp. at 8-9. Accordingly, the Court focuses its attention on whether substantial justification exists.

1 Although Kaskade is certainly not alone in trying to avoid discovery by presenting merits-
2 based arguments, resolution of the instant motion is not a close call. The case law is overwhelming
3 that a challenge to the sufficiency of a live claim or defense does not create a valid basis for a
4 relevance objection, and Kaskade cited to no contrary authority. Indeed, Kaskade skirts the issue
5 now before the Court in opposing the request for expenses, arguing that expenses should not be
6 awarded because there is a good-faith dispute as to the underlying legal arguments. *See* Resp. at
7 9. Such contention misses the mark. As discussed at length above, whether Kaskade disputes the
8 soundness of the mitigation defense in substance is not pertinent to whether he could appropriately
9 withhold discovery by interposing a relevance objection on that live defense. His relevance
10 objection clearly lacks merit.

11 Accordingly, the Palms' request for an award of expenses will be granted. The Court
12 encourages the parties to confer in an attempt to agree on an amount of expenses. If that fails, the
13 Palms must file a Motion to Calculate Expenses by October 9, 2020.

14 || V. CONCLUSION

15 For the reasons discussed above, Defendant's motion to compel discovery and for an award
16 of expenses is **GRANTED**.

17 IT IS SO ORDERED.

18 || Dated: September 14, 2020

Nancy J. Koppe
United States Magistrate Judge